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In the Supreme Court of the United States

OCTOBER TERM, 1920.

No. 695.

O. O. ASKREN, ETC., ET AL.,
Appellants,
vs.
THE CONTINENTAL OIL COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

BRIEF AND ARGUMENT OF APPELLANTS.

Statement.

This case was before this court at the October Term, 1919, as No. 521, consolidated with two other cases involving identical propositions, Nos. 522 and 523.

Since then Mr. Askren's term as attorney general of the State of New Mexico has expired, and Mr. Harry S. Bowman, his successor in office, has been substituted in his stead in this court.

Inasmuch as a full statement of the case down to the answer was made in the brief on the previous hearing, it will not be repeated now, except to say that there was an amendment of the complaint before the trial on the merits, to the general effect that the plaintiff itself uses gasoline at each of its distributing stations in New Mexico, in the operation of its automobile tankwagons and otherwise, from that which is shipped into the State by it in tank cars, and that under the provisions of the act under attack, it is prohibited from so using gasoline except upon the payment of the so-called excise tax of two cents per gallon therefor, which is in fact and law a property tax and as such void under the provisions of Sec. 1 of Art. VIII of the state constitution, for the reason that it is not levied in proportion to the value of said gasoline, but is an arbitrary tax fixed and determined without regard to the value of each and every gallon of such gasoline, and denies to the plaintiff the equal protection of the laws and amounts to the taking of plaintiff's property without due process of law, in contravention of the Fourteenth Amendment to the Federal Constitution, and in violation of Sec. 8 of Art. I of that instrument, which vests in Congress the exclusive power to regulate commerce between the states.

The defendants made answer which may be summarized as follows, in respect to its important particulars:

They deny that the act of the state legislature violates any specified provision of the Constitution of the United States; they deny that the plaintiff, according to its custom and ordinary method in the conduct of its business in New Mexico, sells in said tank cars the whole of the contents thereof to a single customer before the package or packages in which the gasoline was shipped have been broken, but aver that if the company at any time sells the whole of the contents of said tank cars to a single customer before broken, in the course of its business, such method is only occasional and rare, and the quantity so sold in unbroken packages in usual business habit is insignificant as compared with sales made by it, at retail, after original packages have been broken, not constituting more than one or two per cent of the gross business done in gasoline sales; they deny that in the usual and regular course of its business, it ships gasoline purchased in a foreign state in barrels and in packages containing not less than two five-gallon cans into New Mexico, and that, in such usual course, without breaking such packages it is and was accustomed to sell the gasoline in such original packages, and that such gasoline so contained is sold and delivered to customers in the same form and condition as received in New Mexico, but aver that the introduction by it of gasoline in barrels or packages containing not less than two five-gallon cans is only occasional, extraordinary and rare, constituting an insignificant portion of the plaintiff's gasoline business not exceeding, including that sold in original tank cars, one or two per cent of its gross gasoline business in New Mex-

ico, and say that the usual and ordinary custom of the plaintiff in said business is as later stated; they admit that such gasoline so introduced by the plaintiff is not purchased from a licensed distributor, but that it itself is a gasoline distributor under the law; they admit that the plaintiff has the stations alleged to which it ships gasoline from time to time, in the regular course of its business, and from time to time sell gasoline in the manner stated by it, but with the limitations later alleged in the answer; they admit the requirement to pay the sum of $50.00 per annum for each of the said stations as an annual license tax, but deny that it is for the privilege of selling gasoline in interstate commerce, and they, the defendants, declare that it is not their purpose as officers charged with the performance of duties under the said act, nor is it the purpose of the State of New Mexico thereunder to interfere with, lay burdens upon or to tax any gasoline brought into the State of New Mexico which remains interstate commerce, but only to direct and operate such law in respect to such gasoline brought into and found within the State of New Mexico, which has ceased to be in interstate commerce, but has become a matter of intrastate commerce and mingled with the mass of property in said state; they admit that said act declares it to be unlawful for any person to distribute or sell gasoline after July 1, 1919, without having paid said license tax, and requires application for such license with the remittance of the amount thereof; but they deny that said act exacts of the plaintiff that it pay for the privilege of shipping or selling gasoline in interstate commerce the said excise tax of two cents per gallon, and say that the law officers of New Mexico, and its officers charged with the enforcement of the said law, and

the State of New Mexico do not construe the said act as affecting interstate commerce, and have no purpose or intention to enforce it in such manner, but only insofar as intrastate commerce is concerned; they deny that it is required that it shall render the said monthly statements for the privilege of engaging in interstate commerce, accompanied by the aggregate excise tax, but say that the provisions of the said law relate only to intrastate commerce in said commodity, and that they and the State of New Mexico have no intention otherwise to apply it; they admit the existence of the penalties and remedies by suit and by injunction prescribed, but deny that such provisions of the law concern interstate commerce; they deny that such taxes constitute an unlawful or any burden in interstate commerce, or that it is the intention of said law to affect interstate commerce therewith; they admit that all gasoline sold, used or distributed in New Mexico is imported, and that no gasoline is produced in the state; that in addition to the sales of gasoline previously described in the complaint, as qualified by the answer, the plaintiff ships gasoline from some or all of the states mentioned in tanks, barrels or packages, and sells such gasoline so shipped from said tanks, barrels or packages in such quantities as the purchaser may desire, and this they say is the usual and ordinary method of the plaintiff's business in gasoline, and forms the much greater part thereof, to-wit, substantially ninety-eight per cent in this state; they admit that after the 1st day of July, 1919, it was their intention to enforce the said act of the legislature, but only insofar as it relates to intrastate commerce, except in regard to the license tax which cannot be apportioned, but in which regard they allege that the quantity of business at the sev-

eral stations done in interstate commerce is insignificant as compared with the quantity done thereat in intrastate business, the said stations being respectively used for the purpose of both interstate and intrastate business in gasoline, the respective proportions being substantially two per cent interstate and ninety-eight per cent intrastate; they admit that the plaintiff also uses gasoline at each of its distributing stations in the operation of its automobile tank wagons and otherwise from gasoline shipped into the state by it in tank cars, but aver that the quantity so used is infinitesimal, and deny any intention to apply the law to gasoline so used, and deny that such tax on gasoline so used is a property tax and void under the New Mexico constitution as such for any reason stated in the complaint, and deny the remaining allegations of the complaint on this subject; they aver that it is immaterial whether or not gasoline is the only article of commerce upon which an excise tax is imposed by the State of New Mexico, or that such imposition constitutes a discrimination against the products of other states or a denial to the plaintiff of the equal protection of the laws under the Federal Constitution; they aver that gasoline is brought into the State in tanks, barrels and cans, and that thereupon those packages are broken and that gasoline is therefrom sold in quantities to suit customers, in the proportions aforesaid.

By way of further answer the defendants allege matter tending to show more specifically the manner of the plaintiff's business as intrastate rather than interstate.

The plaintiff moved to strike from the answer the following indicated parts thereof:

That the sale in original packages, tank cars, is

occasional, rare and insignificant as compared with the sales made after original packages broken, not constituting more than one or two per cent of the gross business; and the similar allegation with reference to barrels and cans; and the allegations that neither the state officers nor the state construe or propose to enforce the law as affecting interstate commerce but only in relation to intrastate commerce and that the sale at retail forms ninety-eight per cent of the company's business in New Mexico; and in paragraph four the allegation that the law does not affect interstate commerce, except that the license tax cannot be apportioned, but that the business done at the several stations in interstate commerce is insignificant as compared with the quantity done in intrastate commerce, such stations being used for both interstate and intrastate commerce in gasoline in the respective proportions of two per cent interstate and ninety-eight per cent intrastate, and that the defendants propose to enforce the law but only in respect to intrastate business and commerce.

The ground of the motion is that those allegations are immaterial, irrelevant, redundant, do not state facts constituting a defense and because the act on its face applies alike to interstate and intrastate commerce, and for the further reason that upon the face thereof the act is not separable.

The plaintiff moved to strike all that part of the answer by way of further answer for the same reasons. The said motion was ignored by the court on the trial and in its opinion.

The only evidence deemed material on the trial, in view of this court's opinion on the previous presentation of this cause, rendered April 19, 1920, by Mr. Justice Day, in consolidated causes Nos. 521,

522 and 523, October Term, 1919, was supplied by a stipulation to the following effect:

(a) That, during the year 1918, 3,862,150 gallons of gasoline, shipped into New Mexico, were sold in said State after breaking the packages in which said gasoline was introduced into New Mexico, and that said quantity is an aggregate of sales made in that year from broken packages, by The Contitnental Oil Company;

(b) That, during the said year 1918, 230,400 gallons of gasoline, shipped into New Mexico from other states, were sold in New Mexico in the original packages in which said commodity was introduced into said State, by The Continental Oil Company;

(c) That in the year 1919, the aggregate of sales made from broken packages of gasoline, shipped into the State of New Mexico from other states, amounted to 3,749,900 gallons, by The Continental Oil Company;

(d) That in the year 1919, the quantity of gasoline sold by the said Company in the said State, in the original containers in which introduced, amounted to 84,350 gallons.

(e) That in the first seven months of the year 1920, The Continental Oil Company sold in New Mexico, from broken packages, 2,522,350 gallons of gasoline;

(f) That in the first seven months of the year 1920 the said Company sold in New Mexi-

co, in the original containers in which shipped, 264,550 gallons of gasoline;

(g) That from July 1, 1919, to August 1, 1920, The Continental Oil Company consumed for its own use, of gasoline which it had shipped from other States, 7984 gallons, in the regular conduct of its business, and of this quantity 3600 gallons were consumed from July, 1919, to December, 1919, inclusive, and 4384 gallons were consumed and used from January, 1920, to July, 1920, inclusive.

The district court, in its opinion, seems to have misapprehended the decision of this court on the former hearing, in parts, immaterial and material to the present review, but nevertheless founds its judgment on the argument that as the statute by its general language may seem to affect both interstate and intrastate commerce, it is unconstitutional and cannot be separated unless, first, the constitutional and the unconstitutional parts are capable of separation so that each may be read and may stand by itself, and, second, that the unconstitutional part is not so connected with the general scope of the law as to make it impossible, *if it is stricken out*, to give effect to the apparent intention of the legislature in enacting it, thus ignoring the statement of this court on the original hearing that:

"From the averments of the bills it is impossible to determine the relative importance of this part of the business (which is taxable) as compared with that which is nontaxable, and at this preliminary stage of the cases we will not go into the question whether the act is sep-

arable, and capable of being sustained so far as it imposes a tax upon business legitimately taxable."

All questions are foreclosed against the plaintiff in the said original opinion except the separability of the act, and that separability, as reserved by this court, relates more to the practicability of determining, by the rule of relative importance, as applied to the facts when adduced, of the taxable and non-taxable business done and thus concerns more the practicability of determining as matter of fact what sales were made in interstate commerce and what sales were made in intrastate commerce.

To adopt the language of this court in a case hereafter to be quoted from, the question is whether, "*The subjects of taxation can be separated* so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state."

On the theory that the act was not separable in any sense, the district court held it invalid and made its temporary injunction perpetual.

Thus the ruling of this court in this very case was misconceived, and a long line of its pertinent and controlling decisions held for naught.

I.

THE ENTIRE ACT IS NOT RENDERED UNCONSTITUTIONAL MERELY BECAUSE IT CANNOT BE CONSTITUTIONALLY APPLIED IN ALL CASES.

"The rule of construction universally adopted is that when a statute may constitutionally

operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom, or cases in which, it cannot constitutionally apply; but it is to be deemed constitutional and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the constitution." (1 *Sutherland Stat. Construction, Sec.* 298, *quoting* 41 *N. H.* 555.)

The same author also says:

"A statute which had the effect of regulating both state and interstate commerce in the same provision was held valid as to the former and void as to the latter." (id)

In the case of *McCullogh vs. Commonwealth*, 43 *L. Ed.*, 382, *at* 386, the Supreme Court say:

"It is elementary law that every statute is to be read in the light of the constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That whatever may be its words, it is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties. So, although general language was introduced into the statute of 1871,

> it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control. And if there were, as it seems there were, certain special taxes and dues which under the existing provisions of the state constitution could not be affected by legislative action, the statute is to be read as though it in terms excluded them from its operation."

In the case of *Kehrer vs. Stewart*, 117 Georgia, 969, a tax general in its terms, was levied on the business of conducting packing houses. The defendant claimed that the entire statute was invalid in that it failed to exclude from its operation interstate business done in that connection. The defendant was doing both an interstate and an intrastate business. The Supreme Court of Georgia held the statute unconstitutional only insofar as it affected the interstate business, on the ground that the defendant could not escape taxation on his domestic business merely because he was engaged in other lines of endeavor not subject to tax.

The case of *Ratterman vs. Western Union Tel. Co.*, 127 U. S. 411, would seem directly in point. The following question was there certified to the Supreme Court:

> "Whether a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the state, but which were returned and assessed in gross and without separation or apportionment, is wholly

> invalid, or invalid only in the proportion and to the extent that said receipts were derived from interstate commerce."

The parties there stipulated as to what proportion of the receipts was derived from each class of business, and the Supreme Court said:

> "Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that, so far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, and that so far as it was only upon commerce wholly within the state, its was valid."

The court then discusses the state freight tax, 15 Wall. 232, and continued:

> "This ruling shows that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the state to collect that arising upon commerce solely within its own territory."

After discussing numerous authorities the court concludes:

> "Under these views, we answer the question, in regard to which the judges of the Circuit Court divided in opinion, by saying that a single tax, assessed under the revised statutes

of Ohio, upon the receipts of the telegraph company, which were derived partly from interstate commerce and partly from commerce within the state, but which were returned and assessed in gross, and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate comcomerce."

II.

THE DOMESTIC BUSINESS OF THE CORPORATION WAS PROPERLY SUBJECT TO TAXATION.

This Court doubtless had in mind the rule laid down in *Crutcher v. Kentucky*, 141 U. S. 47, for therein it was held that the domestic business of a corporation was not subject to state taxation if that domestic business were only incidental to the interstate business of the corporation, and where it was necessary for the corporation to carry on its domestic business as an aid to its interstate business.

This question is thoroughly considered in the case of *Kehrer vs. Stewart*, 49 L. Ed., 663; 197 U. S. 60, in which all of the cases bearing upon it are discussed, and where the court concludes:

> "If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago, upon an order filled there, refused the goods shipped, and the only way of disposing of them was by

sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher v. Kentucky*, 141 U. S., 47; but if the agent carried on a definite, though minor, part of his business in the state by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business."

Only a cursory consideration of the opinion of this Supreme Court is necessary in order to see that it did not construe the statute in question and did not determine that it was unconstitutional in part. No such question was presented to the Supreme Court for determination, the only matter presented being whether or not, upon the allegations of the complaint to the effect that the defendants were threatening to tax both the plaintiff's interstate and its domestic business, the lower court was justified in granting a temporary injunction. The Supreme Court held that if the defendants were attempting, as was alleged, to tax the interstate business, an injunction was properly issued and in the absence of a showing as to whether or not the domestic business was of such relatively small importance as to

be a mere incident to that which was interstate, it was proper to make the injunction general in its terms. (*Kehrer vs. Stewart*, 49 L. Ed. 663). This Supreme Court did not pass on the question whether or not the act would be construed to apply to domestic business when, under the allegations of the then undenied complaint, it was directly stated that the defendants would attempt to tax both varieties of business under the act.

III.

THE TERM "SEVERABILITY" AS USED BY THE SUPREME COURT INCLUDES THE IDEA OF SEVERABILITY IN ENFORCEMENT OF THE ACT.

It is contended that in using the term "separable" this Court meant only separable in phraseology. But we say that the term "separable", as used in the decision, means separable in application, rather than in phraseology, and includes the idea of holding the statute to apply only to domestic business. This is clearly shown by the case of *Chesapeake and O. R. R. Co., vs. Ky.*, 179 U. S. 388, where the Supreme Court said:

> "Indeed, we are by no means satisfied that the Court of Appeals did not give the correct construction of this statute in limiting its operation to domestic commerce. It is scarcely courteous to impute to a legislature the enactment of a law which it knew to be unconstitutional, and if it were well settled that a separate coach law was unconstitutional as applied to interstate commerce, the law applying on its

face to all passengers should be limited to such as the legislature were competent to deal with. The court of appeals has found such to be the intention of the general assembly in this case, or, at least, that if such such were not its intention the law may be supported as applying alone to domestic commerce. *In thus holding the act to be severable,* it is laying down a principle of construction from which there is no appeal."

The law here considered was not separable in phraseology and no contention was made that such was the case. You refer to it as follows:

> "The law in broad terms, requires all railroad companies operating railroads within the state of Kentucky, whether upon lines owned or leased by them, as well as all foreign companies operating roads within the state, to furnish separate coaches or cars for the travel or transportation of white and colored passengers upon their respective lines of railroad".

It is true that the act considered in the above decision had been construed by the state court in Kentucky. 2 The decision is here cited merely to demonstrate that the United States Supreme Court considers the word "separable" "severable" to include a separability of an act construing it to apply only to domestic commerce. This is doubtless the reason why the Supreme Court stated in the former appeal of the case at bar, that the separability of the act would depend upon the relative importance of the two classes of business, but there remains also the rule of validity by presumption. If

its separability was dependent only on the phraseology of the act, the question of relative importance would have been immaterial and the Supreme Court could, and doubtless would have decided the entire matter at the former hearing.

IV.

THE SEVERABILITY OR INSEVERABILITY OF A STATUTE WILL BE DETERMINED BY ITS PRACTICAL OPERAION.

The act will be construed as severable or applicable only to domestic commerce. This however is no new doctrine. The following are a few of the late cases setting forth this doctrine. Numerous other cases holding to the same effect will be cited later under hearings in this brief.

> "These decisions, however, deal merely with a question of statutory definition; and it is hardly necessary to repeat that when this court is called upon to test a state tax by the provisions of the constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the state *but rather by the practical operation and effect* of the tax as applied and enforced." (*Wagner vs. Covington* 40 Sup. Ct. Rep. 92, 251 U. S. 95, L. Ed. 77.)

Again the Supreme Court states:

> "In cases of this kind, we are concerned not with the characterization or construction of

> the state law by the state court nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state." (Citing numerous cases.) *Corn Products Co. vs. Eddy*, 63 L. Ed. 398.

The case was one in which the plaintiff asked for an injunction against the enforcement of a state law requiring all corn syrup to be labled "glucose".

It should be kept in mind that where an act, general in its terms, has not been construed by the state courts, as here, and no attempt has been made to so enforce it as to apply in an unconstitutional manner, as here, the federal courts will presume that it will be construed by the state courts as restricted in its operation to those matters upon which it can constitutionally operate and the federal courts will not presume that it will be enforced unconstitutionally. This is the holding in *Reid vs. Colorado*, 187 U. S. 137 at 152 where the court said:

> "As there is no evidence in the case as to the practical operation of this regulation upon shippers of cattle, as it does not appear otherwise than that the statute can be obeyed without serious embarrassment or unreasonable cost, the court cannot assume arbitrarily that the state acted wholly without authority or that it unduly burdened the exercise of the privilege of engaging in interstate commerce."

To the same effect is the case of *Packet Co. vs. Keokuk*, 95 U. S. 80.

V.

A DISAVOWMENT OF AN INTENTION TO ENFORCE THE ACT IN AN UNCONSTITUTIONAL MANNER IS BINDING ON THE TRIAL COURT IN THE ABSENCE OF REBUTTING PROOF.

In the case of *Weigle vs. Curtice Brothers Co.*, 63 L. Ed. 144, Advance Sheet February 1, 1919, an injunction was asked for to restrict the officers of Wisconsin from enforcing a law against the sale of food containing benzoates. There, as here, the act was general in its terminology, and there, as here, it was contended that the act was an interference with interstate commerce. There, as here, the defendant disavowed any intention of so enforcing the act. The Supreme Court states:

> "The defendant disavowed any intention that the state laws affected or purported to affect sales by the importer in the unbroken wooden packages containing the bottles, and the decree treated that subject as taken out of the case."

In the case just cited an injunction was granted by the lower court. The case was reversed by the Supreme Court on the ground that no interference with intestate commerce was shown.

The Court said:

> "Such regulation is not an attempt to supplement the action of Congress in interstate

commerce, but the exercise of an authority outside of that commerce that always has remained in the states."

By the decision the Supreme Court specifically approved the action of the lower court in holding that the alleged interference with interstate commerce was eliminated by the disavowal of the defendant.

VI.

IN THE ABSENCE OF AN ATTEMPT BY THE TAXING OFFICERS TO SO ENFORCE A LAW AS TO CONTRAVENE THE CONSTITUTIONAL RIGHTS OF THE PLAINTIFF, AN INJUNCTION WILL NOT BE GRANTED.

The plaintiff asks for an injunction to prevent a threatened interferecne with its rights by the levying of a tax upon its interstate commerce in gasoline. The state has denied that such interference is threatened or intended. This clearly placed on the plaintiff the burden of proof on that issue and that burden has not been met.

The plaintiff in effect admitted that none of its constitutional rights were threatened but claimed that the act under which a constitutional tax is sought to be levied on its domestic business is void because in some other case under different circumstances the state might attempt to exercise an unconstitutional power under the provisions thereof. This brings up the doctrine of *Austin vs. The Board of Aldermen*, 7 Wall. 694 in which a Massachusetts statute provided for the assessment of national bank

stock in the city or town "in which any shareholder in such association resides." The United States statute permitted such stock to be taxed at the place where such bank was located and not elsewhere. The plaintiff, a shareholder in such bank, there asked for an injunction against the collection of such a tax claiming as it is here claimed that the act, by its terms, purported to grant to the state the right to collect a tax forbidden by federal statute. The tax which was sought to be collected was not beyond the power of the state, for the plaintiff in that case happened to reside at the same place as that in which the bank was located. The United States Supreme Court there affirmed a judgment denying the injunction upon the ground that the plaintiff had not shown that as to him there had been any threat of on improper levy of tax, saying:

> "Whether, in another case, arising upon a different state of facts, the statute may not produce results in conflict with the act of Congress, and which this court will therefore be bound to revise and correct, is an inquiry upon which we are not called to enter. We can only consider the statute in connection with the case before us."

In the case of *Ohio River Co. vs. Dittey*, 232 U. S. 576, 58 L. Ed. 737, the statute of Ohio in general terms provided for the payment of a tax upon the privilege of carrying on business in that state. The plaintiff asked for an injunction upon the same ground as is urged here, to-wit: that the act was general in its terms and by its terms would include a tax upon the interstate business of the plaintiff. There, as here, there had been no construction of

the statute by the state court and there had been no attempt to enforce the act in an unconstitutional manner. This Court there held that no injunction could properly issue, saying:

> "Certainly, in the absence of a construction by the state court of last resort to the effect that the receipts from foreign commerce are to be included, and without any attempt on the part of the taxing authorities to include them, the Federal courts ought not to place a construction upon the act that would render it unconstitutional."

We respectfully submit that this case is conclusive. In *Tiernan vs. Rinker*, 102 U. S. 123, you say:

> "In the present case the petitioners describe themselves as engaged in the occupation of selling spirituous, vinous, malt and other intoxicating liquors; that is, in all the liquors mentioned and others not mentioned. There is no reason why they should be exempted from the tax when selling brandies and wiskeys and other alcoholic drinks, in the quantities mentioned, because they could not be thus taxed if their occupation was limited to the sale of wines and beer."

In the railroad commission cases (*Stone vs. Farmers Loan and Trust Co.*, 116 U. S. 307) it was urged that a state tax, general in its terms, was unconstitutional in toto because its terminology would include the regulation of interstate commerce. The

act there in question was one regulating the charges which might be made by public carriers. There, as here, however the plaintiff failed to show that the state authorities were attemptnig or would attempt to enforce the act so as to apply to the interstate commerce of the plaintiff. You say, (page 335):

> "Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within * * * * * * as yet the commissioners have done nothing. There is, certainly, much that they may do in regulating charges within the State, which will not be in conflict with the Constitution of the United States. It is to be presumed that they will always act within the limts of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

VII.

WHERE A LAW IN GENERAL TERMS INCLUDES A TAX ON BOTH DOMESTIC AND INTERSTATE COMMERCE THE FEDERAL COURT WILL, IN THE ABSENCE OF AN ADJUDICATION BY THE STATE COURT, PRESUME THAT THE LAW WILL BE CONSTRUED AS APPLYING TO THAT ONLY WHICH THE STATE MAY CONSTITUTIONALLY TAX.

It will save confusion to pass separately upon the three classes of taxes sought to be levied there-

by, to-wit: the excise tax of two cents per gallon on all gasoline sold in New Mexico, the occupation tax of fifty dollars for each distributor of gasoline doing business in New Mexico and the tax of two cents per gallon upon all gasoline used in this state not purchased from a licensed distributor.

In the case of *St. Louis, etc., Railway Co. vs. Arkansas*, 235 U. S. 350, 59 L. Ed. 265, a statute of the state of Arkansas was construed which required all corporations "organized under the laws of Arkansas or any foreign company authorized to do business in this state for profit" to pay certain taxes, and provided that if there be a willful failure to pay the same the charter of such company should be revoked upon proper court action. The plaintiff, a railroad company doing both interstate and intrastate business in Arkansas claimed that the act was unconstitutional in that it provided for the forfeitures of its charter and of its privilege of doing interstate business in Arkansas in the event of its failure to pay the tax in question. The court says at page 368 that if so construed the statute would be unconstitutional as imposing a restriction upon the right to transact interstate business in Arkansas. The act however had not been construed by the state court and no attempt had been made to forfeit the privilege of the plaintiff of doing interstate business and the court held, without passing upon whether the act was ambiguous or not that the mere fact that such a construction would render it unconstitutional was sufficient to justify the Supreme Court in assuming that the contrary construction would be given to the act by the state court, saying (page 369):

"But the state court has not as yet con-

strued the section as calling for the forfeiture of the privilege of doing interstate business in the event of nonpayment of the franchise tax; nor is the state here insisting upon such a construction. The present is an ordinary action to collect the tax as a debt, and not to forfeit the franchise for its nonpayment. Non constat but that the state court will hold, when confronted with the question, that the franchise to be forfeited pursuant to Section 20 is confined to intrastate commerce. Such a construction is clearly foreshadowed by what the court has in this case held with respect to the general purpose of the act. And in exercising the jurisdiction conferred by Section 237, Judicial Code, it is proper for this court to wait until the state court has adopted a construction of the statute under attack, rather than to assume in advance that such a construction will be adopted as to render the law repugnant to the Federal Constitution. (Citing numerous cases.) At present, therefore, we have merely to consider whether Section 20 so clearly requires a forfeiture of the interstate franchise for nonpayment of the tax in question that it is not reasonable to anticipate that the state court will put another construction upon it. And in doing this we ought not to indulge the presumption either that the legislature intended to exceed the limits imposed upon state action by the Federal Constitution, or that the courts of the state will so interpret the legislation as to lead to that result."

In the case of *Singer Sewing Machine Co. vs. Brickell*, 233 U. S. 304, 58 L. Ed. 974, an act of the state of Alabama provided:

> "Each person, firm, or corporation selling or delivering sewing machines either in person or through agents, shall pay $50 annually, for each county in which they may sell or deliver said articles."

It will be noted that there was no ambiguity in the act in question nor was it separable in its terminology and it was so argued before the United States Supreme Court, the claim being made that it was a regulation of interstate commerce as well as of domestic, the Supreme Court saying, (page 312):

> "But it is argued that the courts cannot properly sustain a statute which in direct terms applies to all commerce, by restricting it to cases of actual interference with interstate dealings. To quote from the brief: 'All such laws as will necessarily affect interstate commerce when it arises are void. We do not have to await actual results or actual commerce to pronounce them void. And, of course, a statute of this character, which is void as a whole, from its unity of character, will as readily be so declared in a case in which only intrastate commerce may be actually involved as otherwise'."

The court will note the exact similarity of the argument there advanced and that advanced by plaintiff in the case at bar. This argument was disposed of as follows:

> "This argument, we think, misses the point. The statute under consideration does not in direct terms or by necessary inference manifest

an intent to regulate or burden interstate commerce. Full and fair effect can be given to its provisions, and an unconstitutional meaning can be avoided, by indulging the natural *presumption that the legislature was intending to tax only that which it constitutionally might tax.* So construed, it dos not apply to interstate commerce at all. The statute provides for a license or occupation tax. Normally, as the averments of the bill sufficiently show, the occupation may be and is conducted wholly intrastate, and free from any element of interstate commerce. The fact that, as carried on in Russell county, a like occupation is conducted with interstate commerce as an essential ingredient, is wholly fortuitous."

We again call the court's attention to the fact that the statute under consideration provided for a tax upon each person selling or delivering machines either in person or through agents. The statute was no more ambiguous and was no more separable than in the case at bar. The relative importance of the interstate and domestic business was there also considered by the Supreme Court.

The case of *Rotterman vs. Western Union Telegraph Co.*, 127 U. S. 411, is probably the leading case on this question. We again call the court's attention to the fact that there this Court unhesitatingly stated that:

"A single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from com-

merce within the State, but which were returned and assessed in gross and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce."

It is noted that the decision in that case also is based upon the question of the manner in which the act will be applied.

The court say:

"This ruling shows that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the State to collect that arising upon commerce solely within its own territory."

It is not contended in our case, and the evidence forbids the contention, that there will be any difficulty in separating and separately returning for tax purposes the gasoline sold in domestic commerce, for the plaintiff makes the tax return itself and under the act need only return that which has been sold in domestic commerce.

The Ratterman case is specifically approved in the later case of *Western Union Telegraph Co. vs. Pennsylvania*, 128 U. S. 39. The same doctrine is stated in the case of *McCullough vs. Virginia*, 172 U. S. 102, where the court say:

> "It is elementary law that every statute is to be read in the light of the Constitution. *However broad and general its language,* it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach."

This decision, also, overcomes the theory that an act will be construed as unconstitutional if in broad and general language, apparently covering unconstitutional as well as constitutional powers.

The case of *Supervisors vs. Stanley,* 105 U. S. 305, was a case in which a statute, in general terms, declared that national bank stock should be taxed according to its value, and did not provide for the deduction of debts which the taxpayer might owe while other statutes of the state provided for the deduction of such debts on the taxation of other properties. The court there refused to enjoin the collection of a tax in a case where the plaintiff failed to show that he owed any debts holding that in such cases the act did not discriminate against the taxpayer and that it could be construed as applying only to such a case.

Plaintiff contends that the rule laid down by Sutherland in his work on statutory construction applies only in cases where the statute is ambiguous in its terms. Such is not the statement in that work. Mr. Sutherland says:

> "Sometimes the provisions of a statute are valid as applied to certain cases or objects and invalid as applied to others, and the question arises whether such a statute is void in toto because it imports too much, or whether it will be construed as applying only to the objects and

cases within the power of the legislature and so up-held as valid legislation. The rule of construction universally adopted is that when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the Constitution it is not to be held unconstitutional merely because there may be persons to whom, or cases in which, it cannot constitutionally apply; but it is to be deemed constitutional and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the Constitution."

This entire question is very comprehensively discussed in Encyclopedia of Supreme Courts Reports, thus:

"In construing a state statute with reference to the commerce clause of the federal constitution, every possible presumption should be indulged in favor of the validity of the statute, and it should be construed, if possible, so as not to make it an invasion of the exclusive power of Congress, to regulate interstate commerce. It is the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of its power under the constitution to regulate interstate and foreign commerce, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. In determining whether a state statute is or is not void as an attempt to regulate interstate and

foreign commerce the operation and effect of the law, and not its purpose, is to be considered." (7 Encyc. U. S. Sup Ct. Rep. 355.)

The occupation tax feature of the act is disposed of under the authorities just cited. The plaintiff cannot avoid paying a $50 occupation tax for each distributor who sells gasoline in domestic commerce, merely because that same distributor may also occasionally sell gasoline in original unbroken packages.

The act provides for the levy of a tax on the use of gasoline not purchased from a licensed distributor. The pleadings and the proofs show that the amount used by the plaintiff is so small as almost to fall within the rule *de minimis non curat lex.* But it is said that this provision must fall before the provision of our state Constitution that all property taxes must be proportioned to the value of the property taxed and it is claimed that this feature is a property tax on the gasoline. A tax on the right to use gasoline is no more a property tax than is a tax on the right to use an automobile. The general argument and citations cover this point.

In conclusion; the injunction should be dissolved, for the reason that the plaintiff has entirely failed to show that it is in need of any injunctive order, having failed to prove that the defendants threaten to collect any tax on plaintiff's interstate commerce, and under such circumstances this court will not consider the statute authorizing the taxation of domestic commerce as unconstitutional merely because in some other case or under some other circumstances an unconstitutional attempt to levy such tax might be made.

Further, this Court has specifically remanded the case here with instructions to uphold the law as applying to domestic commerce only if the proof shall show that the domestic commerce is not a mere incident, under the rule of relative importance, to the interstate commerce and that the tax on the two classes of business can be separated in application.

Furthermore, where, as here, the state court has not construed a statute, general in its terms, the Federal courts will conclusively presume that it was only intended to apply to those cases to which the state legislature might constitutionally apply it. This court will therefore hold the act severable in application, to domestic business, that is "the subjects of taxation can be separated".

Respectfully submitted,

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